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IN THE

Supreme Court of the United States

October Term, 1983

STANLEY McDONALD, NORMAN R. HAGFORS and CLAYTON JENSEN,

Petitioners,

vs.

JOHNSON & JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

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INTRODUCTION

Petitioners ("plaintiffs") submit this supplemental brief, pursuant to United States Supreme Court Rule 24.6, to call attention to new cases not available at the time of the filing of the petition for certiorari on April 10, 1984.

Since the filing of the petition, this Court has decided *Copperweld Corp. v. Independence Tube Corp.*, —— U.S. ——, 52 U.S.L.W. 4821 (June 19, 1984), and *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, —— U.S. ——, 52 U.S.L.W. 4928 (June 27, 1984). Separately and together, these cases establish that respondent herein ("J&J") engaged in conduct that this Court has long recognized to be in violation of Sections 1 and 2 of the Sherman Act, and for which this Court has long provided a remedy to persons situated similarly to the plaintiffs. These authorities further establish that it is necessary for this Court to grant certiorari to make clear that acquiring a new product for the purpose of suppression constitutes a violation of the antitrust laws for which those laws provide a remedy to the wronged developers of the product.

ARGUMENT

THIS COURT'S RECENT DECISION IN *COPPERWELD* AND *NCAA* ESTABLISH THAT THE RESPONDENT IN THIS ACTION COMMITTED VIOLATIONS OF THE ANTITRUST LAWS FOR WHICH PETITIONERS ARE ENTITLED TO RELIEF.

In *Copperweld, supra,* the issue before the Court was "whether a parent corporation and its wholly owned subsidiary are legally capable of conspiring with each other under §1 of the Sherman Act." 52 U.S.L.W. at 4822. Although this Court held that there could be no such conspiracy, this Court was very careful to draw precise distinctions between that situation and other situations that clearly would involve combinations in violation of Section 1 of the Sherman Act.

In doing so, this Court expressly interpreted numerous seminal antitrust decisions in exactly the same way in which the plaintiffs have interpreted those same decisions in their petition for certiorari. 52 U.S.L.W. at 4823-25. These decisions, on which the plaintiffs have relied in their petition for certiorari, include *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Reading Co.*, 253 U.S. 26 (1920); and *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944).

In reviewing these cases in the *Copperweld* decisions, this Court clearly stated and reaffirmed that an affiliation or acquisition for the purpose of suppressing competition between the affiliating companies is a combination in violation of Section 1 of the Sherman Act. 52 U.S.L.W. at 4823.

In its analysis, this Court quoted with approval some of the very same language from *Yellow Cab* and *Reading* quoted by the plaintiffs in their petition for certiorari (p. 19, fn. 40):

> " '*And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act.* The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination. The theory of the complaint . . . is that "dominating power" over the cab operating companies "was not obtained by normal expansion . . . but by deliberate, calculated purchase for control." ' *Id.* [Yellow Cab], at 227-228 (emphasis added) (quoting *United States v. Reading Co.*, 253 U.S. 26, 57 (1920))." 52 U.S.L.W. at 4823.

This Court then went on to explain the true purport of the quoted language to be exactly as urged by the plaintiffs in their petition for certiorari (p. 19):

> "The passage as a whole, however, more accurately stands for a quite different proposition. It has long been clear that a pattern of acquisitions may itself create a combination illegal under §1, especially when an original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct. The *Yellow Cab* passage is most fairly read in light of this settled rule. In *Yellow Cab*, the affiliation of the defendants was irrelevant because the original acquisitions were *themselves* illegal. An affiliation 'flowing from an illegal conspiracy' would not avert sanctions. Common ownership and con-

> trol were irrelevant because restraint of trade was 'the primary object of the combination,' which was created in a '"deliberate, calculated"' manner. Other language in the opinion is to the same effect." 52 U.S.L.W. at 4823-24 (citing in footnotes 4 and 6 to *Northern Securities*, *Standard Oil*, *American Tobacco*, and *Crescent Amusement*).

Thus, just as the plaintiffs urge in their petition for certiorari, this Court expressly recognized in *Copperweld* that an affiliation or acquisition for the purpose of suppressing competition violates Section 1 of the Sherman Act. Even more significant, this Court recognized that the unlawfulness of the affiliation or acquisition may first become apparent only from the conduct of the defendant *subsequent* to the acquisition or affiliation, which reveals the original anticompetitive purpose.

This, of course, is exactly the present case, in which the plaintiffs seek certiorari so that this Court may reaffirm this oldest of antitrust principles, which the Eighth Circuit majority misapprehended.

The essence of the plaintiffs' claim in this case is that J&J acquired their business for the purpose and with the intent of suppressing that business, including the abilities and know-how of the plaintiffs themselves and the electronic pain control device that was the fruit of their labors. Moreover, the anticompetitive intent with which J&J made this acquisition first became apparent only from the conduct of J&J after the acquisition. Obviously, standing alone, in a vacuum, the acquisition itself was not necessarily unlawful; had J&J truly intended to promote the plaintiffs' business and pain control device, the acquisition would have been procompetitive, inasmuch as J&J would have developed the fledgling TENS industry for everyone through its efforts. What made the acquisition unlawful was its being part and parcel of an overall

scheme of suppression, which included both acquisition and subsequent suppression of the business, its products, and the plaintiffs.

Of course, this Court has long recognized that a course of conduct may violate the Sherman Act even though consisting of "wholly innocent acts" since "it is not the form of the combination or the particular means used but the result to be achieved that the statute condemns." *American Tobacco*, 221 U.S. at 809; *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 707 (1962); *Schine Chain Theatres v. United States*, 334 U.S. 110, 119 (1948). As such, J&J's acquisition thereby became unlawful as part of an overall combination in restraint of trade.

Significantly, this is exactly what this Court said in *Copperweld*, when it recognized that acquisitions or affiliations for the purpose of restraining trade violate Section 1 of the Sherman Act, even though the purpose of the affiliation or acquisition becomes known only through the subsequent conduct of the defendant. This case presents a compelling circumstance for granting certiorari to make sure that lower courts will not continue to ignore this important rule of antitrust law.

Similarly, in the *NCAA* case, this Court reaffirmed a number of important propositions on which the plaintiffs premise their petition for certiorari. In *NCAA*, this Court held that the defendant athletic association had violated Section 1 of the Sherman Act, under the rule of reason, through its agreements to televise college football games.

Of particular significance to the *NCAA* decision, as it bears on this case, are the following propositions enunciated and underscored by this Court:

(1) Combinations among competitors for the purpose of restricting output are generally pernicious, viewed with sus-

picion, and in violation of Section 1 of the Sherman Act. 52 U.S.L.W. at 4932:

> "By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade." (footnote omitted)

The restraint presented in this case is of course no different in substance or effect from a horizontal agreement among competitors to limit output. An acquisition to suppress a competitive product is for the purpose of restricting output, and undeniably has that effect. When J&J acquired the plaintiffs' pain control device to suppress it so as to prevent its competition with J&J's drugs, J&J achieved, by fraud and coercion, an artificial limitation on output—exactly the type of restraint condemned by this Court in *NCAA*.

(2) Where the plaintiff has demonstrated the existence of a serious and pernicious restraint of trade not falling within a *per se* category, that restraint will violate the rule of reason even without market definition and competitive analysis, where the defendant comes forward with no plausible procompetitive justification for the restraint. 52 U.S.L.W. at 4934-35:

> "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.' [*National Society of*] *Professional Engineers* [*v. United States*], 435 U.S. [679 (1978)] at 692. . . . We have never required proof of market power in such a case. This naked restraint on price and output requires some competitive justification even in

the absence of a detailed market analysis.[42] (footnotes 39-41 omitted)

"[42] The Solicitor General correctly observes:

'There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found not only that NCAA has power over the market for intercollegiate sports, but also that in the market for television programming—no matter how broadly or narrowly the market is defined—the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. Consequently, unless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. While the "reasonableness" of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of "reasonableness." *And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.*'" (Emphasis added.)

So, too, here, the restraint involved is suppression of a competitive product, a restraint so inherently pernicious and anticompetitive that no further market analysis is necessary for its condemnation, particularly where J&J has advanced no procompetitive justification, and indeed can advance none. Finding a violation of Section 1 on this record is thus fully consistent with this Court's pronouncements in *NCAA*.

(3) A touchstone to analyzing any restraint of trade is the extent to which the restraint causes damage to consumers, whose protection is a primary underlying purpose of the antitrust laws. 52 U.S.L.W. at 4933-34.

Without question, the restraint of trade involved in this case harmed consumers by not merely partially reducing the output of an ordinary product, but by depriving hundreds of millions

of consumers of a safe, effective, and economical cure for pain. The restraint in this case deprived consumers of much more than televised football; it deprived them of health and well-being. As the *NCAA* decision makes clear, *a fortiori*, such an injury to consumers perforce must give rise to a violation of the antitrust laws.

(4) Finally, there is the matter of standing in the *NCAA* case. Although this Court dwelt at length on the injury to consumers resulting from the defendants' restraint of trade, the plaintiffs were not consumers, but were members of the NCAA itself, colleges that had voluntarily joined that institution and taken part for years in its television programs. Yet, so obvious and beyond question was the standing of the plaintiff universities, that the opinion contains not a single word raising the issue of their standing. Yet, clearly, the very same arguments could be made against the standing of the plaintiffs in the *NCAA* case as were made against the plaintiffs in this case, and accepted by the Eighth Circuit majority.

The plaintiffs in the *NCAA* case freely and voluntarily joined and remained in that organization, one of the purposes of which was to arrange television contracts for its members. For years, the plaintiffs took part in and accepted the benefits of the television contracts negotiated by the *NCAA*.

Arguably, by joining and remaining in the NCAA and sharing in the television contracts, the plaintiff universities voluntarily withdrew from the market for televised football, and thereby lost their antitrust standing. Yet so implausible and inimical to the purposes of the antitrust laws is such a proposition that this Court did not even seriously consider it.

Of course the plaintiff universities in the *NCAA* case had standing; of course they never intended to abandon the market even though they enrolled in the NCAA; and of course the plaintiffs in this case have standing, inasmuch as they too

never intended to withdraw from the market when they placed their future and the future of their business within the hands of J&J. To hold otherwise would disregard substance for form, undermine the purposes of the antitrust laws, and potentially permit a serious violation of those laws to go unpunished. Thus, *NCAA* further demonstrates the need to grant certiorari in this case to vindicate the plaintiffs' standing to bring their claims.

CONCLUSION

On the basis of the foregoing arguments and authorities, plaintiffs respectfully request this Court to grant their petition for a writ of certiorari.

Dated:

Respectfully submitted,

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